

[1] percent. And he explained that it was due to the on-premise  
[2] music use data which we have from DMX. He related the direct  
[3] licenses that were in-house and how that would have impacted  
[4] the on-premise reporting and he said when you weighted the two  
[5] together it dropped the overall savings rates down to 20, 22  
[6] percent.

[7] Q. And did you and he discuss in any greater detail the nature  
[8] of the on-premise reporting data that is provided to BMI by  
[9] DMX?

[10] A. I don't think we went into great length about what was  
[11] supplied by DMX to BMI.

[12] Q. Why don't we explore the rest of that topic with  
[13] Mr. Laughlin when he gets on the stand.

[14] I would like to conclude my examination with some  
[15] questions about DMX' direct licensing program. BMI's  
[16] affiliated composers and music publishers are entitled, under  
[17] this arrangement with BMI, to license the public performance  
[18] rights in their musical compositions directly to users such as  
[19] DMX in lieu of BMI if they choose to do that; is that correct?

[20] A. Yes, we have non-exclusive rights.

[21] (Continued on next page)

[22]  
[23]  
[24]  
[25]

[1] this was information and contacts BMI began to receive from  
[2] music publishers who had been approached by DMX?

[3] A. Yes. The music publishers called us on that.

[4] Q. And that included some contacts from the so-called major  
[5] music publishers?

[6] A. Yes, sir.

[7] Q. Could you for the record identify who you understand to be  
[8] the major music publishers?

[9] A. Sure. There would be four majors within the industry of  
[10] publishing. Sony, Universal, Warner Chappel and EMI.

[11] Q. And am I correct that the distributions which they reflect,  
[12] at least within the monies received and disbursed by BMI  
[13] attributable to the commercial music services industry, that  
[14] they, the four collectively, represent about 70 percent of all  
[15] publisher distributions?

[16] A. I think that's correct, yes.

[17] Q. Is that about right?

[18] A. Yes.

[19] Q. Now, you and others in senior management -- are you a  
[20] member of senior management, by the way?

[21] A. That's a good question. I'm senior vice president of  
[22] licensing. I like to consider myself a member of senior  
[23] management, but others may not.

[24] Q. I will gladly treat you as such.

[25] A. I appreciate that.

[1] BY MR. RICH:

[2] Q. BMI understands that this is a decision that's to be made  
[3] by its affiliates without interference from BMI, is that  
[4] correct?

[5] A. Absolutely.

[6] Q. Prior to the direct licensing initiative engaged in by DMX  
[7] beginning in 2006, what was the prevalence, to your knowledge,  
[8] of such direct licensing of BMI repertoire works by members of  
[9] the commercial music service industry?

[10] A. By the commercial music service industry? I think it was  
[11] nil.

[12] Q. Now, there came a time, I take it, when --

[13] A. Mr. Rich, I remember reading something about in the '94 to  
[14] the 2004 period that there was talk about direct licensing, but  
[15] I'm not sure if it ever came to fruition.

[16] Q. Thank you. Now, putting aside this litigation and what's  
[17] come through the discovery record, there came a time when BMI  
[18] became aware that DMX was contacting music publishers about  
[19] entering into direct license arrangements covering, among other  
[20] rights, the grants of music performing rights, is that correct?

[21] A. Yes.

[22] Q. And is it your recollection that BMI came to learn of this  
[23] sometime during 2006?

[24] A. I believe that's the time frame, yes, sir.

[25] Q. Is it correct that the manner in which BMI came to learn of

[1] Q. Now you and others in senior management at BMI came to  
[2] learn that DMX was offering these music publishers one and a  
[3] half times the combined writer and publisher distributions they  
[4] reported to DMX that BMI and ASCAP had been making on account  
[5] of DMX performances of their music, is that correct?

[6] A. Again, I learned about it from BMI, Mr. Rich, that it was  
[7] one and a half times what BMI was paying, the publishers was  
[8] being offered one and a half times what BMI was paying.

[9] Q. And in addition in 2006 you and others at BMI were provided  
[10] with the basic terms of the agreement that DMX was offering to  
[11] potential direct licensing publishers, is that correct?

[12] A. Forgive me. There was two parts to the direct licensing  
[13] campaign, and I'm not quite sure of when one happened versus  
[14] the other, sitting here today, but I remember getting a term  
[15] sheet for one deal and then it subsequently changed somewhat a  
[16] couple of steps later in the process.

[17] Q. Let me show you a document that's been premarked as RX 22,  
[18] please? Do you recognize this series of e-mails?

[19] A. Yes, I do.

[20] Q. Who is Ann Sweeney?

[21] A. Ann Sweeney is the executive vice president of Warner  
[22] Chappel music now. She was I believe the head of business  
[23] affairs for Sony Music at this time.

[24] Q. And it was in this capacity that you and she were  
[25] communicating?



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[1] A. Yes.  
 [2] Q. That prior capacity?  
 [3] A. Correct.  
 [4] Q. Her e-mail was to you and Alison Smith. Could you for the  
 [5] record identify who Ms. Smith is?  
 [6] A. Alison Smith is senior vice president of distribution and  
 [7] performing rights for BMI.  
 [8] Q. So am I correct that in or about August of 2006,  
 [9] Ms. Sweeney forwarded to you and to Ms. Smith what the re: line  
 [10] indicates is DMX's direct license proposal?  
 [11] A. Yes.  
 [12] MR. RICH: I'd like to offer this if there's no  
 [13] objection, your Honor?  
 [14] MR. FITZPATRICK: No objection.  
 [15] THE COURT: Received.  
 [16] (Respondent's Exhibit RX 22 received in evidence)  
 [17] Q. Now, you came to understand, I take it, that the basic form  
 [18] of agreement that DMX was offering offered publishers their pro  
 [19] rata share of a pool of \$25 per location, correct?  
 [20] A. Yes, sir. I believe at the time I thought it was \$25 for  
 [21] BMI.  
 [22] Q. You later came to understand otherwise?  
 [23] A. Very -- through discovery process for this trial, yes, but  
 [24] at the time we believed it was \$25 for the BMI portion.  
 [25] Q. And what did you subsequently come to understand?

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[1] A. That the 25 represented both ASCAP and BMI's portion.  
 [2] Q. Is it accurate that by the summer of 2006 BMI was contacted  
 [3] by all four of the major publishers concerning DMX's  
 [4] marketplace initiative?  
 [5] A. By the summer of 2006?  
 [6] Q. Yes.  
 [7] A. I'm not sure if all four had contacted BMI by that time.  
 [8] Q. I can show you this excerpt from your deposition, but let  
 [9] me read it to you first and see if it refreshes you. This is  
 [10] from line 23 at page 155. You were asked:  
 [11] "Q. You had been advised in the summer of 2006 by each of the  
 [12] major publishers that they had been approached by DMX  
 [13] concerning direct licensing?  
 [14] "A. I believe so, yes.  
 [15] "Q. And when I say major publishers, you understand that I am  
 [16] referring to Sony, Universal, Warner Chappel and BMI."  
 [17] Your answer is "Yes."  
 [18] A. Was that corrected later to say I wasn't sure if EMI  
 [19] contacted us?  
 [20] Q. If so -- I don't know the answer and if so, I accept that.  
 [21] A. I believe, I know Universal, I know Sony and Warner Chappel  
 [22] were interested.  
 [23] Q. Is it accurate that the majors who had contacted you, one  
 [24] or more, were interested in knowing what the others were  
 [25] planning to do?

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[1] A. They did ask what the others were planning to do, yes, they  
 [2] did.  
 [3] Q. I take it you declined to indicate?  
 [4] A. Absolutely.  
 [5] Q. Now, as we'll get to in a bit greater detail, at least two  
 [6] of these majors specifically over time asked BMI to match the  
 [7] economic terms that had been offered to them by DMX, correct?  
 [8] A. Yes, sir.  
 [9] Q. The first of those was Sony, correct?  
 [10] A. Yes.  
 [11] Q. And the next was Universal?  
 [12] A. Yes.  
 [13] Q. Okay. In which case, these publishers advised BMI, didn't  
 [14] they, that should BMI match DMX's proposal, those publishers  
 [15] would forego entering into direct licenses with DMX, correct?  
 [16] A. Yes.  
 [17] Q. That was the purpose of the exercise?  
 [18] A. They said if you could match this, they'd rather stay with  
 [19] us. They also wanted to understand the dynamics of where we  
 [20] were with DMX in terms of the licensing of DMX.  
 [21] Q. Now, BMI was interested to meet these requests from its  
 [22] major affiliates if at all possible, true?  
 [23] A. True.  
 [24] Q. BMI had concerns over DMX's direct initiative, didn't it?  
 [25] A. No. Again, we felt that if a publisher came to us and

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[1] asked us for, to match an offer they were getting on the  
 [2] outside to remain with BMI, we'd explore that. We were not  
 [3] trying to hamper DMX from direct licensing.  
 [4] Q. Do you feel there was a need to somehow level the  
 [5] information playing field?  
 [6] A. Yes, I did. I felt that DMX was offering, again, at this  
 [7] time I believe \$25 per location for BMI's music use. They were  
 [8] paying us \$12 per location. We were seeking \$36 per location,  
 [9] so we felt they were trading in the middle for this direct  
 [10] license. We just wanted to make sure the license -- our  
 [11] affiliates, our writers and publishers understood that our  
 [12] license was interim, that they were paying at a rate that was  
 [13] established back in 1987, and that we felt they should have  
 [14] been at a higher rate and that we were pursuing that in court.  
 [15] We didn't tell them, we made it absolutely clear on every phone  
 [16] call that it was their absolute right to directly license. In  
 [17] no way were we trying to influence them. We were just  
 [18] providing them information in order to make a sound business  
 [19] decision.  
 [20] Q. You felt that entities the likes of Sony/ATV Music  
 [21] Publishing Company, Universal Publishing Company, some of the  
 [22] largest corporations in the world, were at the risk of being  
 [23] disadvantaged in their negotiations with DMX unless they were  
 [24] provided with certain additional information by BMI?  
 [25] A. They called us seeking that information, Mr. Rich.



[1] Q. In fact, BMI viewed the DMX initiative as competitive with  
[2] BMI's own license offerings to the CMS industry, isn't that  
[3] true?  
[4] A. I actually felt the direct licensing they were paying at  
[5] the time, the \$25 per location was higher than what BMI was  
[6] getting on an interim basis and we were at a disadvantage by  
[7] not being able to match those.  
[8] Q. If successful, DMX's licensing initiative stood to reduce  
[9] BMI's own collections from DMX and potentially from other CMS  
[10] industry participants, isn't that true?  
[11] A. I would agree with you that it stood to lessen DMX's  
[12] license fees to BMI, as the adjustable fee blanket license  
[13] would allow.  
[14] Q. It was of no concern to you, however?  
[15] A. I'm not sure how it would have played across the rest of  
[16] the industry. I would imagine that either, and we've seen this  
[17] today, that Play Networks and, I forget, there's one other,  
[18] have requested an adjustable fee blanket license on a  
[19] going-forward basis. I forget the other service which has. So  
[20] ultimately, I do think that it will reduce BMI's fees as they  
[21] go out and directly license, as the license should.  
[22] Q. And you were also concerned, were you not, that a  
[23] successful DMX licensing initiative threatened to reduce the  
[24] prevailing fee level for the CMS industry licenses as reflected  
[25] in BMI's own license agreements with the industry, correct?

[1] A. I think it was going to have an impact on our licensing.  
[2] Again, if the rate was the standard contract, I'm not sure  
[3] where that ultimately would have ended up, Mr. Rich.  
[4] Q. If successful, it threatened, did it not, in BMI's  
[5] estimation, to lower the royalty levels received by BMI's  
[6] affiliates for the performances of their music by DMX, true?  
[7] A. I think direct licensing would reduce royalty levels  
[8] payable to other affiliates.  
[9] Q. Payable to --  
[10] A. Other affiliates.  
[11] Q. If successful, it might have set a precedent for other  
[12] users to attempt to replicate that process, true?  
[13] A. I think other users had the right to replicate that  
[14] process, yes.  
[15] Q. That was viewed as a risk to BMI, correct?  
[16] A. I don't think it would be viewed as a risk. I think it was  
[17] viewed as this is going to happen.  
[18] Q. In fact, BMI is aware of other large users and industries  
[19] of users that have indicated a desire to operate under blanket  
[20] carveout licenses, isn't that true?  
[21] A. Yes, it is true.  
[22] Q. And in BMI's senior management's estimation, it was  
[23] worthwhile to make an investment to forestall this initiative  
[24] from gaining a head of steam, isn't that true?  
[25] A. That's false.

[1] Q. Even to bend BMI's distribution rules a bit to accomplish  
[2] it, isn't that true?  
[3] A. That's false.  
[4] Q. Now, you personally had discussions with the major  
[5] publishers concerning DMX's direct license initiative, right?  
[6] A. Yes, I did.  
[7] Q. In which you advised them that DMX was paying BMI some  
[8] three times less than the what you termed new established rate  
[9] in the marketplace, is that right?  
[10] A. I believe I phrased it DMX was paying us at a rate of 12 to  
[11] \$14, which was three times less than the established rate of  
[12] 36.36.  
[13] Q. And that BMI was hoping to triple the license fees it was  
[14] currently receiving from DMX through negotiation or potential  
[15] rate litigation, correct?  
[16] A. I said we were seeking to get DMX on the same licensing  
[17] agreement as every other CMS provider signed on to.  
[18] Q. At the time you represented that the going rate was 36.36,  
[19] had BMI done any research as to the actual effective rates of  
[20] CMS licenses of the type that PX 1293, pardon me, JX 1293  
[21] undertakes here?  
[22] A. Is that that big document, Mr. Rich?  
[23] Q. Mm-hmm?  
[24] A. No. But we did estimate that DMX's rate would have been  
[25] north of the 36.36.

[1] Q. Did you do any estimation of the effective rates then being  
[2] paid by any of DMX's major competitors?  
[3] A. Not at that time.  
[4] Q. Now, BMI enlisted its most senior management, did it not,  
[5] to weigh its options in responding first to Sony and then to  
[6] Universal?  
[7] A. Sony again approached us to see if we could match an offer  
[8] that DMX made for direct license, and we brought it to the very  
[9] senior management group to say here is what Sony has been  
[10] offered by DMX, here is what we think we can do, we don't think  
[11] we can do that.  
[12] Q. The effort involved Mr. Bryant, Del Bryant?  
[13] A. Yes it did.  
[14] Q. What is his position at BMI?  
[15] A. He's president and CEO of BMI.  
[16] Q. Did it involve John Cody, did it not?  
[17] A. Yes.  
[18] Q. Who is Mr. Cody?  
[19] A. Executive vice president and COO of BMI.  
[20] Q. Did it involve Mr. Marvin Berenson, did it not?  
[21] A. Yes.  
[22] Q. Who is he?  
[23] A. Senior vice president and general counsel of BMI.  
[24] Q. Did it involve Ms. Smith who we identified, correct?  
[25] A. Yes.

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[1] Q. And you, right?

[2] A. Yes.

[3] Q. Senior team?

[4] A. Yes.

[5] Q. Now, Sony/ATV, which was the first requester of the majors,

[6] controls the rights to songs written by a fair number of

[7] luminaries correct?

[8] A. Yes, sir.

[9] Q. Their catalog includes the Beatles' music?

[10] A. I believe it does. I am, quite candidly, not familiar with

[11] all of their catalog.

[12] Q. Now, am I correct that, we'll do this in more detail with

[13] Ms. Smith, but just as a predicate for understanding this, am I

[14] correct that typically when BMI distributes royalty it

[15] distributes a portion of those royalties to the composer

[16] associated with a musical composition and the remaining portion

[17] to the music publishing company associated with it?

[18] A. Correct.

[19] Q. And if there's a default, it tends to be 50 percent to one

[20] and 50 percent to the other, right? Although there are

[21] variations?

[22] A. I believe that's the case. For every dollar we distribute,

[23] 50 cents is allotted to the publisher, 50 cents is allotted to

[24] the writer.

[25] Q. Now, I take it that Sony's request to BMI was that BMI

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[1] Q. Do you have an understanding what task Ms. Smith was

[2] assigning to Ms. Chenault?

[3] A. I believe she was being asked to pull Sony's royalties.

[4] I'm not quite sure of the date span or things like that. But

[5] how much did BMI pay to Sony for the DMX distribution.

[6] Q. And that was for purposes of assisting BMI senior

[7] management in evaluating whether it could match the DMX offer?

[8] A. I believe so.

[9] Q. Is it your recollection that the attached information to

[10] this e-mail constitutes the workup she did?

[11] A. I'm not sure if this is the final product of it all, but it

[12] was the initial phases of it.

[13] Q. Iteration of it?

[14] A. Yes, sir.

[15] Q. Okay.

[16] MR. RICH: I'd offer this in evidence at this point,

[17] your Honor?

[18] MR. FITZPATRICK: No objection.

[19] THE COURT: Received.

[20] (Respondent's Exhibit RX 34 received in evidence)

[21] Q. Now, Sony put considerable pressure on BMI in the period

[22] the summer '07 into the fall '07 to get them a response, is

[23] that accurate?

[24] A. I would say that's accurate.

[25] Q. Let me show you a document that's been premarked as RX 24.

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[1] match the publisher's share of what DMX was offering to it,

[2] correct?

[3] A. I believe that's the case, yes.

[4] Q. And in furtherance of this interest, Sony furnished BMI

[5] with the specifics of the offer that had been made to it by

[6] DMX, is that correct?

[7] A. Yes, it is.

[8] MR. RICH: May I have one second?

[9] (Pause)

[10] Q. Now, BMI evaluated that offer, that is, the DMX offer, to

[11] see if it could match it, is that correct?

[12] A. Yes, sir.

[13] Q. Let me show you a document that's been premarked as RX 34.

[14] You'll see this is an e-mail chain starting with you at the

[15] bottom, addressed to Ms. Smith and then a series of other

[16] e-mails. Can you identify Vinolla Chenault please?

[17] A. Yes Vinolla Chenault was assistant vice president working

[18] for Alison Smith.

[19] Q. In June of 2007, Ms. Smith per this e-mail writes to

[20] Ms. Chenault, "Well, without going into much detail, see below.

[21] I will explain on Monday. So without hesitation I need you to

[22] do the same workup for DMX on Sony as you did for XM. I'm so

[23] sorry, but we got to get it done. We can do the others later.

[24] Hope you have a good weekend." Do you see that?

[25] A. Yes, I do.

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[1] October 26, 2007 e-mail from you to Mr. Bryant, Mr. Cody and

[2] Alison Smith?

[3] A. Yes.

[4] Q. Do you recall preparing this e-mail in or around this time?

[5] A. Yes, I do.

[6] MR. RICH: Offer this in evidence, your Honor?

[7] MR. FITZPATRICK: No objection.

[8] THE COURT: Received.

[9] (Respondent's Exhibit RX 24 received in evidence)

[10] Q. Notice in the second paragraph of this e-mail it states,

[11] "Sony called me this morning," meaning you, "and said that

[12] Marty is pushing for an answer." Who is Marty?

[13] A. Marty Vandier is the CEO of Sony Music Publishing.

[14] Q. And you continue to say, "I told them that we were spread

[15] out around the country but that Del," meaning Mr. Bryant?

[16] A. Yes.

[17] Q. BMI CEO?

[18] A. Yes.

[19] Q. "Would be calling Marty at his house." Correct?

[20] A. Yes.

[21] Q. We'll come back to this memo in a few minutes as to the

[22] denouement, but I want to show you a document that's premarked

[23] as RX 27. This is an October 29, 2007 e-mail from you to

[24] Mr. Cody, and you recall preparing this e-mail?

[25] A. Yes, I do.



[1] **MR. RICH:** Offer this document in evidence?  
[2] **MR. FITZPATRICK:** No objection, your Honor.  
[3] **THE COURT:** Received.  
[4] (Respondent's Exhibit RX 27 received in evidence)  
[5] **Q.** This e-mail you write, "Hey, John, I've updated the work  
[6] sheet with some better numbers. Alison," which I take it as a  
[7] reference to Alison Smith?  
[8] **A.** Yes.  
[9] **Q.** "And I are talking with Del about it this afternoon and  
[10] then he is scheduled to call Marty at 5:00 p.m., not that  
[11] close..." Do you see that?  
[12] **A.** Yes, I do.  
[13] **Q.** So this back and forth with Sony, I take it, culminated in  
[14] or about late October of 2007, is that correct?  
[15] **A.** That is correct.  
[16] **Q.** And I take it that at the end of the day BMI determined  
[17] that it would not match DMX's offer to Sony, correct?  
[18] **A.** That is correct.  
[19] **Q.** And the reason resulted at least in significant part from  
[20] BMI's determination that Sony had misinterpreted a line  
[21] appearing on its periodic BMI royalty distribution statement,  
[22] is that correct?  
[23] **A.** I don't know if Sony misinterpreted it or not in that  
[24] negotiation, in their negotiation with DMX. I know I explained  
[25] what was in BMI's line item to Sony. I'm not sure how they

[1] then transferred that communication in their negotiation to  
[2] DMX.  
[3] **Q.** The line item we're talking about is denominated, at that  
[4] time was denominated on the distribution statement as DMX, is  
[5] that correct?  
[6] **A.** That is correct.  
[7] **Q.** Let's come back to RX 24, please.  
[8] **A.** Yes, sir.  
[9] **Q.** The third paragraph you write: "In looking at the attached  
[10] schedule, it's very hard to come up with what they are seeking.  
[11] Perhaps Sony shared their statement with DMX and DMX used it to  
[12] come up with their offer, not knowing or understanding that  
[13] other background music providers were included in this line  
[14] item. I replicated this approach and just about tied out to  
[15] the offer. If this is the case, DMX will be overpaying Sony  
[16] and only receiving a fraction of the savings via a carveout  
[17] license." You wrote that, correct?  
[18] **A.** Yes, I did.  
[19] **Q.** And that was accurate, right?  
[20] **A.** Yes, it is.  
[21] **Q.** All right, now, let's go through, if we can, using the  
[22] attachment to RX 27, and understanding, help the Court  
[23] understand exactly what it is that your e-mail of three days  
[24] earlier was describing.  
[25] If you look at the attached analysis, attached

[1] beginning at the second page of RX 27, I take it this reflects  
[2] an analysis that BMI had been making of the royalties paid by  
[3] BMI to major publishers on account of DMX performances?  
[4] **A.** Yes, sir.  
[5] **Q.** For a certain period of quarters, correct?  
[6] **A.** Yes, sir.  
[7] **Q.** And this was prepared specifically to assist BMI in its  
[8] consideration of Sony's request that BMI match DMX's offer,  
[9] yes?  
[10] **A.** Yes.  
[11] **Q.** Okay. Now, if we start at the top of the page, the chart  
[12] at the top half of this second page, I take it this sets forth  
[13] the actual amounts distributed to the four major publishers  
[14] attributable to the DMX reporting line on the realized royalty  
[15] statements over the reporting periods identified. Is that what  
[16] that represents?  
[17] **A.** Yes, it does.  
[18] **Q.** Then appearing as a footnote to that chart, your Honor,  
[19] it's at the bottom left of the top half there starting with DMX  
[20] numbers with an asterisk, it states: "DMX numbers above  
[21] include royalties from over 200 background music customers and  
[22] not just DMX." Did I read that correctly?  
[23] **A.** Yes, you did.  
[24] **Q.** And then directly below that is a box denominated DMX only?  
[25] **A.** Yes.

[1] **Q.** And there it's reported, quote, "DMX only accounts for  
[2] approximately 27 percent of DMX line on our affiliate  
[3] statements," correct?  
[4] **A.** Correct.  
[5] **Q.** And directly below that, some math is done to demonstrate  
[6] that the actual 2006 royalties attributable to DMX  
[7] performances, rather than 192,000, according to my notes is  
[8] 27 percent of \$192,274, I believe it is, gets you to \$51,914,  
[9] is that correct?  
[10] **A.** Yes. If you take that full year for 2006 --  
[11] **Q.** Yes?  
[12] **A.** Which is the bottom half of the top spreadsheet?  
[13] **Q.** Right.  
[14] **A.** Sony is \$192,274. You would take 27 percent of that for  
[15] DMX and that would translate into approximately \$51,914 was  
[16] attributable out of that money from DMX.  
[17] **Q.** So just to step back and make sure the record is totally  
[18] clear, Sony had been receiving statements, as had other music  
[19] publishers which among other reporting lines had a line labeled  
[20] DMX, yes?  
[21] **A.** Anybody whose performance was on a commercial background  
[22] service or commercial music service would have received a  
[23] statement that said DMX.  
[24] **Q.** Right. And so in this case for 2006 that line for Sony  
[25] cumulated to some \$192,000, correct?

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[1] A. Yes.

[2] Q. Notwithstanding the label, what this document identifies  
[3] and your prior e-mail elucidates is that while it's labeled  
[4] DMX, in fact the source of income to BMI was not solely DMX,  
[5] but some 200 other reporting background music licensees,  
[6] correct?

[7] A. Correct.

[8] Q. And on deeper analysis, if you isolated out the royalties  
[9] being paid to the majors on account solely of DMX, that's where  
[10] the 27 percent came from, correct?

[11] A. Correct.

[12] Q. Okay. And so when you backed out the real numbers  
[13] attributable to DMX and put it against the offer that had been  
[14] made by DMX, the conclusion was you could not match, match that  
[15] offer to Sony, correct?

[16] A. Yes, it --

[17] Q. Please state it in your own way.

[18] A. Thank you. The concept was since the line item on the  
[19] royalty statement summed numerous background music providers  
[20] into one number, 192,000 in this case labeled DMX, we felt that  
[21] 27 percent represented DMX, the balance represented final fees.  
[22] So if we were going to compare apples to apples comparison with  
[23] what we believed Sony was asking, we had to first try to  
[24] determine what BMI believed would be final fees for DMX, and  
[25] that's where we take the 51,914 and we multiply it by three,

[1] Q. That is what you meant by that, correct?

[2] A. Yes.

[3] Q. Now, on this -- back to the data work on RX 27, on the  
[4] right side of the page appears a box headed 2006 big four  
[5] publisher dollars. Do you see that?

[6] A. Yes. The 1 million 332?

[7] Q. Yes. And I take it this cumulates the earnings of all four  
[8] majors as reported on that DMX reporting line and comes up with  
[9] a total of 1,332,635 and then sets forth the actual amount  
[10] attributable to DMX performances, namely, 27 percent of that  
[11] number or 360,000, is that correct?

[12] A. That is correct.

[13] Q. Okay. And then down a bit further on the right side is  
[14] reported the fact that the big four represents 70 percent of  
[15] total distributions. Do you see that?

[16] A. Yes, I do.

[17] Q. And I take it as we established that was meant at least  
[18] relating to DMX?

[19] A. That is true.

[20] Q. And below that --

[21] A. Just to clarify the way I got there.

[22] Q. Yes.

[23] A. If I, in this box labeled directly under the big four  
[24] publisher dollars it says 2006 DMX license fees of \$1,286,000.

[25] Q. Yes.

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[1] because the rate would increase from 12 to 36 in our minds and  
[2] then over a three-year period. Then we would compare that to  
[3] the DMX number in and of itself.

[4] Secondly, we would add everything together to see if  
[5] we came up with it closer.

[6] Q. Coming back to RX 24 for a minute, the prior document we  
[7] looked at and the cover memo.

[8] A. Mm-hmm.

[9] Q. In the paragraph I had read, the third paragraph I read to  
[10] you previously, you reached the -- you inferred, did you not,  
[11] that DMX had misconstrued the royalty dollars communicated to  
[12] it by Sony as part of their negotiations in coming up with its  
[13] own proposal, correct?

[14] A. I assume that could have happened. Again, I didn't know if  
[15] Sony was trying to negotiate with BMI. I didn't know if they  
[16] were using it, but at this point in time I had to assume  
[17] something and I assume that's what happened.

[18] Q. And that to the degree that DMX taking that royalty line at  
[19] its face value itself would have inferred that 100 percent of  
[20] that sum rather than 27 percent of that sum reflected actual  
[21] BMI distributions to Sony. In formulating its own proposal to  
[22] Sony, you report, in that situation DMX will be overpaying Sony  
[23] and only receiving a fraction of the savings via carveout  
[24] license, correct?

[25] A. That is correct.

[1] A. I took 20 percent off. Again, assuming a 20 percent  
[2] overhead rate to get to the million 29, divided it evenly  
[3] between writer and publisher, and then just simply divided the  
[4] 360 by the 514 and that got me to 70 percent.

[5] Q. Thank you. And if we keep going down that right hand  
[6] column, we see that reported are the respective shares of the  
[7] big four in relation to the distribution showing Sony at  
[8] 14 percent, correct?

[9] A. Yes.

[10] Q. And Universal at 29 percent?

[11] A. Yes.

[12] Q. Those totals add up to 100 percent of the 70 percent, is  
[13] that correct?

[14] A. That is correct.

[15] Q. Now, in October of 2007, I take it, BMI advised Sony that  
[16] it was not going to match BMI's proposal, is that correct?

[17] A. That is correct.

[18] Q. And specifically, you told Sony, did you not, you  
[19] personally did, about this data issue underlying the  
[20] determination, correct, the 27 percent issue?

[21] A. Yes, I did.

[22] Q. You did that both in a phone call to the Sony inside lawyer  
[23] who was involved, correct?

[24] A. Correct.

[25] Q. And in a subsequent e-mail confirmation, is that correct?



[1] A. Yes, it is.  
[2] Q. Let me show you what's in evidence as JX 1313. This is two  
[3] redacted e-mails. At the bottom there's one from you to Jonas  
[4] Kant at Sony/ATV?  
[5] A. Yes.  
[6] Q. Who is he, please?  
[7] A. He's the head of business affairs for Sony/ATV. I'm not  
[8] quite sure of his exact title.  
[9] Q. Do you recall writing this note to Mr. Kant?  
[10] A. I do.  
[11] Q. This is already in evidence. We don't need to offer it.  
[12] Let me read into the record this one paragraph. "Jonas, I just  
[13] wanted to follow up on the voice mail I just left to you. It  
[14] was really good speaking with you on Monday. While we were  
[15] disappointed that we could not meet the number you asked us to  
[16] match via your DMX offer, I'm pleased that it worked out for  
[17] you." What is that a reference to?  
[18] A. That they decided that this was their business decision,  
[19] they decided to go with DMX and I was just letting them know  
[20] that while BMI was disappointed you wouldn't be keeping the  
[21] catalog here, we're happy you made your decision.  
[22] Q. You go on to say, "I was glad to have the opportunity to  
[23] explain the composition of the line item on your royalty  
[24] statement titled DMX. As we discussed, this line also includes  
[25] other royalties from other background music providers and in

[1] fact DMX only accounts for approximately 25 percent," is that  
[2] right?  
[3] A. That's right.  
[4] Q. That was the conclusion we were discussing although we  
[5] talked about 27 percent a few minutes ago, correct?  
[6] A. Yes.  
[7] Q. Now, I take it BMI did not advise DMX of the reality of  
[8] this reporting line, did it?  
[9] A. No, we did not.  
[10] Q. As to what it represented or didn't?  
[11] A. No, we did not.  
[12] MR. RICH: Your Honor, this is a good time to break  
[13] for lunch, and I hope to conclude within 30 minutes after  
[14] lunch.  
[15] THE COURT: Okay. Thank you very much. We will  
[16] recess until, I think probably 2:10 is probably safe.  
[17] (Luncheon recess)  
[18]  
[19]  
[20]  
[21]  
[22]  
[23]  
[24]  
[25]

[1] AFTERNOON SESSION  
[2] 2:20 p.m.  
[3] BY MR. RICH:  
[4] Q. Good afternoon, Mr. O'Neill.  
[5] A. Good afternoon, Mr. Rich.  
[6] Q. You will be happy to know we are nearing the end of this.  
[7] Before lunch we discussed BMI's consideration of a  
[8] request from Sony, ATV publishing in relation to a proposal it  
[9] had received from DMX, yes?  
[10] A. Yes.  
[11] Q. I would like to conclude by discussing the Universal  
[12] counterpart to that.  
[13] I take it that at the same time that BMI was deciding  
[14] whether to match DMX' offer to Sony it received a similar  
[15] request from Universal music publishing, correct?  
[16] A. Correct.  
[17] Q. And the final decision as to how to respond to Universal  
[18] was not made until following BMI's determination not to  
[19] accommodate Sony's request, correct?  
[20] A. Yes, sir.  
[21] Q. It happened after that?  
[22] A. Yes, sir.  
[23] Q. And, in fact, the decision on BMI's part how to respond to  
[24] Universal wasn't made until after Sony entered into its direct  
[25] license agreement with DMX, yes?

[1] A. Yes. It post-dated Sony.  
[2] Q. And this time BMI did put together an economic package  
[3] designed to satisfy Universal, correct?  
[4] A. Correct.  
[5] Q. And thereby to avert Universal also from entering into a  
[6] direct license with DMX, right?  
[7] A. Yes. We matched what DMX was offering.  
[8] Q. And this offer to Universal took the form of a three-year  
[9] guarantee; is that right?  
[10] A. That is correct.  
[11] Q. Okay.  
[12] Which guarantee was against future monies that might  
[13] become payable to Universal in the form of BMI royalty  
[14] distributions on account of DMX commercial performances, right?  
[15] A. Yes.  
[16] Q. Commercial music performances?  
[17] A. Yes, sir.  
[18] Q. And which guaranteed sums were assured to Universal  
[19] irrespective of whether such future royalties earned out the  
[20] guarantees; is that right?  
[21] A. That is right.  
[22] Q. Okay. And, having accepted this arrangement in December of  
[23] 2007 it is your understanding, is it not, that Universal in  
[24] fact declined to enter into a direct license arrangement with  
[25] DMX?

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[1] A. Yes, they did.  
 [2] Q. Now let me show you what's been premarked as RX 31. Beg  
 [3] your pardon. You can leave that with the witness, let's also  
 [4] show him 32. Hold on to 31 for a few minutes.  
 [5] I have put in front of you as RX 32, a document which  
 [6] is a December 7, 2007 letter agreement on BMI letterhead  
 [7] addressed to Songs of Universal Inc. signed by Del Bryant as  
 [8] president and counter-signed by Officers of Universal.  
 [9] Do you see that?  
 [10] A. Yes, I do.  
 [11] Q. Do you recognize this to be the commemoration of the  
 [12] guarantee arrangement that was executed, entered into with  
 [13] Universal?  
 [14] A. Yes, I am. Yes, I do.  
 [15] MR. RICH: I offer that into evidence at this point,  
 [16] your Honor.  
 [17] MR. FITZPATRICK: No objection.  
 [18] THE COURT: Received.  
 [19] (Respondent's Exhibit 32 received in evidence)  
 [20] Q. Looking at paragraph 1 -- and your Honor, I'm going to  
 [21] because of the commercial sensitivity for BMI because of the  
 [22] actual terms, I'm going to make reference to these including a  
 [23] demonstrative but not read numbers into the record for the next  
 [24] few minutes to accommodate confidentiality concerns without  
 [25] needing to worry about the public in the courtroom. If that's

[1] performances of Universal music comes out to around \$106,000.  
 [2] Does that sound about right?  
 [3] A. That sounds about right.  
 [4] Q. Okay.  
 [5] And so, if one wanted to compare the level of the  
 [6] guarantees set forth in the December 7, 2007 letter agreement  
 [7] against \$106,000 you would simply, obviously, compare the  
 [8] \$106,000 to the numbers depicted in paragraph 1. Is that  
 [9] correct?  
 [10] A. Yes.  
 [11] Q. And you get the order of magnitude difference which, again,  
 [12] I won't speak into the record because it will give away the big  
 [13] number. Okay?  
 [14] A. Okay.  
 [15] Q. Now, I want to show you a demonstrative which does a little  
 [16] bit of math and I will hand that out to counsel and the Court,  
 [17] please. The first of these starts at the caption: Universal  
 [18] guarantee is blank times royalties actually earned.  
 [19] Do you have that one in front of you?  
 [20] A. Yes, I do.  
 [21] Q. This, I think, accurately captures the math we just went  
 [22] through first identifying the 2006 royalties on the DMX line,  
 [23] yes?  
 [24] A. Yes.  
 [25] Q. Attributing the DMX portion to them?

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[1] acceptable.  
 [2] If you would look at paragraph 1 of this document and  
 [3] see the numbers set forth in A, B and C?  
 [4] A. Yes.  
 [5] Q. I take it those are the annual sums for the years 2008,  
 [6] 2009 and 2010 that were guaranteed to Universal, is that  
 [7] correct?  
 [8] A. That is correct.  
 [9] Q. And do you still have from before lunch RX 27?  
 [10] A. Yes, I do.  
 [11] Q. If you would turn to the second page of RX 27, please?  
 [12] A. Yes, sir.  
 [13] Q. And looking at the top half of that page remember we talked  
 [14] about the \$192,000 sum that Sony had received?  
 [15] A. Yes.  
 [16] Q. As a comparable number to Universal for 2006 the number  
 [17] next to it 392994?  
 [18] A. Yes, it is.  
 [19] Q. Just to be clear, those were performances reported on the  
 [20] DMX line but which in fact represented more than simply the DMX  
 [21] performances as we discussed, correct?  
 [22] A. Correct.  
 [23] Q. Now, if one does the math off of the 392994 and applies the  
 [24] same 27 percent factor, I will represent to you that the  
 [25] amounts of the 2006 distributions attributable to DMX

[1] A. Yes.  
 [2] Q. The product of that, the \$600,000 set forth there?  
 [3] A. Yes.  
 [4] Q. And then setting forth comparatively the amount of the  
 [5] Universal guarantee for 2008 as against that, correct?  
 [6] A. Yes.  
 [7] Q. Okay.  
 [8] Now, can one counsel from each side come up, please?  
 [9]  
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 [25]



[1] (At side bar)  
[2] **THE COURT:** What is BMI's interest in the  
[3] confidentiality of these numbers?  
[4] **MR. FITZPATRICK:** The only number is the actual --  
[5] **THE COURT:** Excuse me.  
[6] **MR. FITZPATRICK:** The only number that we are  
[7] concerned about is the actual dollar amount of the guarantee.  
[8] **THE COURT:** Yes.  
[9] **MR. FITZPATRICK:** And we -- I mean, it is a number we  
[10] prefer to keep confidential because it is not known among all  
[11] the affiliates exactly how every affiliate is treated so it  
[12] would be -- the sensitivity would be with respect --  
[13] **THE COURT:** The term affiliate meaning?  
[14] **MR. FITZPATRICK:** Other song writers and publishers,  
[15] like Sony for example, would then know how much we guaranteed  
[16] to Universal. Or EMI would know or whatever.  
[17] **THE COURT:** And your reasons for preferring that they  
[18] not know are what?  
[19] **MR. FITZPATRICK:** We just prefer to keep our dealings  
[20] with individual affiliates confidential, your Honor, so that  
[21] they don't all know each other's business.  
[22] **THE COURT:** No more than that.  
[23] **MR. FITZPATRICK:** No more than that, your Honor.  
[24] **THE COURT:** Hmm?  
[25] **MR. FITZPATRICK:** No, no more than that, your Honor.

[1] **THE COURT:** Well, this is a public proceeding  
[2] affecting various aspects of public business and you're  
[3] offering this so that I will rely on it in reaching a decision.  
[4] **MR. RICH:** Indeed.  
[5] **THE COURT:** And I'm expect to be candid about --  
[6] **MR. SALZMAN:** Excuse me. May I join the conference,  
[7] your Honor?  
[8] **THE COURT:** Sure.  
[9] And I'm expected to be candid about my reasons and the  
[10] facts underlying them and --  
[11] **MR. FITZPATRICK:** Your Honor, I have been given  
[12] permission to waive it, if that makes life easier. I just got  
[13] it, so.  
[14] **THE COURT:** You waive the confidentiality?  
[15] **MR. FITZPATRICK:** I do. Yes, your Honor.  
[16] **THE COURT:** Good. You can use the numbers.  
[17] **MR. RICH:** Thank you very much.  
[18] **THE COURT:** I think it is preferable that you do in a  
[19] public court.  
[20] **MR. RICH:** Thank you.  
[21]  
[22]  
[23]  
[24]  
[25]

[1] (In open court)  
[2] **BY MR. RICH:**  
[3] **Q.** Mr. O'Neill, come back to RX 32 for a moment, please?  
[4] **A.** Yes.  
[5] **Q.** Am I correct that the amounts of the annual guarantees  
[6] provided to Universal by BMI for 2008 was the sum of \$600,000?  
[7] **A.** Correct.  
[8] **Q.** 2009 a sum of \$625,000? And for 2010 the sum of \$650,000?  
[9] **A.** That's correct.  
[10] **Q.** And so that the relative ratio between the pre-existing  
[11] levels of royalties attributable to DMX which had been earned  
[12] by Universal of \$106,000 represented roughly one sixth of the  
[13] level of the annual guarantee made pursuant to this document?  
[14] **A.** Yes, that is correct.  
[15] **Q.** Thank you.  
[16] Now, let's do some more math, please, and we can use  
[17] as an aid this second demonstrative which is titled: Expected  
[18] Universal Royalties Under BMI Best Case Scenario.  
[19] Do you have that?  
[20] **A.** Yes, I do.  
[21] **Q.** And if you need a calculator at any point, let me know,  
[22] otherwise I have done the math. But, you are free to check.  
[23] Assuming that all of DMX' approximately 77,000  
[24] locations as of the fourth quarter of 2007 were to be licensed  
[25] by BMI or had been licensed by BMI at the fee level which BMI

[1] seeks, \$36, approximately, a location, by my math that would  
[2] generate in royalty income to BMI approximately \$2.8 million  
[3] for the year.  
[4] Do you accept that?  
[5] **A.** That premise, yes.  
[6] **Q.** Yes.  
[7] **A.** I believe at the time, though, they had about a hundred  
[8] thousand locations based on the e-mail we had from Ann Sweeney.  
[9] The deal offer that DMX made to Sony listed their locations at  
[10] a hundred thousand.  
[11] **Q.** Okay. We can redo the math simultaneously if you would  
[12] like?  
[13] **A.** No.  
[14] **Q.** Let's stay with the 77 and we can up it by whatever amount,  
[15] okay?  
[16] On the premise that that was the actual accounting  
[17] time that would generate about \$2.8 million to BMI, second line  
[18] of the demonstrative, yes?  
[19] **A.** Yes. The math works, yes.  
[20] **Q.** Now, you testified earlier that BMI takes anywhere from 17  
[21] to 20 percent off for expenses so I took the more conservative  
[22] 17 percent figure off the top from the \$2.8 million best case?  
[23] **A.** Okay.  
[24] **Q.** Which would leave about \$2.3 million available for  
[25] distribution on account of DMX performances?

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[1] A. Okay.  
 [2] Q. Now, that would be both to writers and to publishers,  
 [3] correct?  
 [4] A. That is correct.  
 [5] Q. And so BMI will not, as a matter of practice, ever --  
 [6] ever -- distribute less than 50 percent of such a sum to its  
 [7] writers; is that correct?  
 [8] A. Out of every dollar, yes, 50 cents gets allocated to.  
 [9] Q. So, out of every \$2.3 million it will never distribute less  
 [10] than \$1.15 million or half that sum to writers, correct?  
 [11] A. Yes, that's our practice.  
 [12] Q. So, I have deducted that and that would leave you a  
 [13] publisher share available for distribution to all participating  
 [14] publishers of \$1.15 million, is that correct?  
 [15] A. Yes.  
 [16] Q. Now, we earlier established that Universal's share of the  
 [17] 70 percent share held by the four majors was about 29 percent.  
 [18] Do you recall that?  
 [19] A. Yes.  
 [20] Q. And therefore of the total universe of dollars if you took  
 [21] 29 percent of 70 percent you would be at 20 percent of total  
 [22] publisher distributions, correct?  
 [23] A. Again, with -- yes, wasted on your representation.  
 [24] Q. Sounds right, yes?  
 [25] So, if you took 20 percent which would be Universal's

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[1] you are going to ask me to conclude from it. Is it that BMI  
 [2] contemplated if it attained the \$36 per location figure that it  
 [3] would recover a great deal more than it was guaranteeing?  
 [4] Under this arrangement?  
 [5] MR. RICH: No. As the next --  
 [6] THE COURT: What comparison are you going to draw to  
 [7] what point?  
 [8] MR. RICH: As the next five minutes I think will  
 [9] demonstrate, your Honor, there was a presentation and a series  
 [10] of representations made to the BMI board that were inaccurate  
 [11] in terms of BMI's expectation as to recoupment and I will leave  
 [12] it to your Honor to conclude as to the relevance of it. It  
 [13] seemed to us and it seems to us to be strong evidence that BMI  
 [14] was going to throw as much money at stopping a second major  
 [15] publisher from entering into a direct license as it needed to  
 [16] irrespective of any realistic probability of recovery to the  
 [17] point of, etc.  
 [18] Let me just finish the examination.  
 [19] THE COURT: As long as I understand the overarching  
 [20] point. You may proceed.  
 [21] BY MR. RICH:  
 [22] Q. If you would turn back to what's already in evidence as RX  
 [23] 31, please?  
 [24] A. Yes, sir.  
 [25] Q. I take it that a memorandum was prepared for a committee of

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[1] rightful share of the maximum anticipated income if you earned  
 [2] the full \$36 against an available \$1.15 million, by our math  
 [3] you come down to a grand total of \$230,000, correct?  
 [4] A. Under your example, yes.  
 [5] Q. Yes.  
 [6] And the 2008 guarantee to Universal which was the  
 [7] lowest of the three years was \$600,000, correct?  
 [8] A. That is correct.  
 [9] Q. And so, that's not yet even half of the guaranteed sum  
 [10] under your best case, is that correct?  
 [11] A. This isn't our best case. This wasn't how we figured it  
 [12] out.  
 [13] Q. Okay.  
 [14] But, this would be the math, would it not, if you  
 [15] achieved \$36.36 from Universal? \$36?  
 [16] What is incorrect about how this?  
 [17] A. I think this mathematically works correctly.  
 [18] Q. Now, BMI needed to get its board approval for this  
 [19] transaction, is that correct?  
 [20] A. Yes, it is.  
 [21] Q. This wasn't an everyday transaction, was it?  
 [22] A. A guarantee, I think, always needs board approval.  
 [23] Q. And in connection with that board approval --  
 [24] THE COURT: Mr. Rich, I'm not sure whether you are  
 [25] through with this point but I have already lost track of what

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[1] the board to approve the guarantee arrangement?  
 [2] A. Yes, it was.  
 [3] Q. Do you recognize RX 31 as that documentation?  
 [4] A. I do.  
 [5] Q. And it went to a committee of the board whose initials are  
 [6] the PRRC, is that correct?  
 [7] A. That is correct.  
 [8] Q. For the record, what is the PRRC?  
 [9] A. I don't quite know what the initials stand for. Performing  
 [10] rights royalty committee potentially?  
 [11] Q. Okay. And I take it this is the board committee to which a  
 [12] guarantee of a request of this sort is directed?  
 [13] A. Correct.  
 [14] Q. In the middle of the first page of this document under  
 [15] history of prior guarantees and earnings, do you see that?  
 [16] A. Yes, I do.  
 [17] Q. In fact, there was no history of prior guarantees for  
 [18] Universal, was there?  
 [19] A. It listed last guarantee amount zero.  
 [20] Q. Yes.  
 [21] A. Yes.  
 [22] Q. The history was that they were like any other publisher,  
 [23] they lined up and got their share of distributions in the  
 [24] ordinary course, correct?  
 [25] A. That is correct.



[1] Q. Such that in the second quarter '06 to the first quarter  
[2] '07 that amount as reported here was \$359,613, correct?  
[3] A. That is correct.  
[4] Q. And, am I correct that that number in fact representing  
[5] earnings is not simply from DMX but from roughly 200 music  
[6] publishing -- pardon me commercial music services?  
[7] A. Correct.  
[8] Q. As we discussed earlier. Okay.  
[9] Indeed, if you turn to the second page of this which  
[10] is the board memorandum of justification, it is pointed out in  
[11] the third paragraph, is it not, "it is important to note that  
[12] the earnings listed above are comprised of DMX and some smaller  
[13] background music services."  
[14] Do you see that?  
[15] A. Yes, I do.  
[16] Q. And then it goes on: But on a going forward basis BMI will  
[17] be breaking out DMX as its own line item on our royalty  
[18] statements.  
[19] Correct?  
[20] A. That is correct.  
[21] Q. Now, this memorandum doesn't anywhere say, however, to the  
[22] board, does it, that solely 27 percent of three hundred 59  
[23] thousand some odd dollars is represented by DMX. It didn't  
[24] quantify it, did it?  
[25] A. No, it did not.

[1] Q. To your knowledge, was the board otherwise notified about  
[2] that, about that percentage, the \$359,000, what it represents?  
[3] A. I don't have that knowledge.  
[4] Q. Now, the memo goes on in the same paragraph that I was just  
[5] quoting from to advise the board that if BMI prevails in what  
[6] is now this litigation and receives a rate at its requested  
[7] \$36.36, then, quote: It is likely that the Universal earnings  
[8] will more than triple and the expected return on the guarantee  
[9] when all retroactive periods are applied would be in the 75 to  
[10] 100 percent range.  
[11] Do you see that?  
[12] A. Yes, I do.  
[13] Q. But, if you look back at the last demonstrative here, under  
[14] BMI's \$36.36 scenario, based on the assumptions underlying this  
[15] at least, the most that Universal could have hoped to achieve  
[16] was some \$230,000, correct?  
[17] A. Under your demonstrative?  
[18] Q. Yes?  
[19] A. That's correct.  
[20] Q. And if we did the math for a hundred thousand locations  
[21] instead I will indicate that the number would be instead of  
[22] \$230,000, \$300,000 or barely 50 percent of the first year  
[23] guarantee, correct?  
[24] A. Yes. Under your demonstrative, that's correct.  
[25] Q. Under our demonstrative, okay.

[1] So, when you advised the board that on the assumption  
[2] that BMI would achieve, if BMI prevails in your words here,  
[3] prevails in the rate court proceeding and in the appeal, the  
[4] result you say is that it is likely that Universal's earnings  
[5] will more than triple, meaning from \$12 to \$14 to \$36?  
[6] A. More than triple. It could go to \$49 at this point in  
[7] time. We were debating whether to use the ASCAP high end.  
[8] Q. You don't say more than four or five or six times, you say  
[9] more than triple; right?  
[10] A. Which means more than three times.  
[11] Q. Okay. I'm not going to quibble about that. But, the fact  
[12] of the matter is you testified for the last two days here,  
[13] didn't you, and the record is replete with evidence saying that  
[14] when asked by publishers you said compare \$12 to \$14 to \$36  
[15] which is the prevailing established rate in the industry, that  
[16] is a more than tripling we are looking to get from DMX.  
[17] You didn't say to those publishers we are looking for  
[18] \$49, did you?  
[19] A. No. I said that we are looking at the established blanket  
[20] rate which is in the market and which is more than three times  
[21] what DMX is currently paying.  
[22] Q. Can you cite to single commercial music services entity  
[23] ever that BMI was getting more than \$49 from per location?  
[24] Music Choice? Any of those?  
[25] A. No, I can't.

[1] What I said was that we were modeling numbers for the  
[2] direct -- for the adjustable fee blanket license that exceeded  
[3] \$36.36.  
[4] Q. You didn't say that to the board?  
[5] A. No, we didn't. We just said more than three times.  
[6] Q. Yes, \$12 to \$36; correct?  
[7] A. More than three times.  
[8] Q. You didn't say more than four or five or six times, did  
[9] you?  
[10] A. No, I did not.  
[11] Q. No.  
[12] So you think your math was good to the board, yes?  
[13] A. Yes, I do.  
[14] Q. And you believe at the time this memo went to the board,  
[15] based on everything you knew about the levels of historic  
[16] distributions that Universal had achieved, based on your best  
[17] case outcome in a rate court case, based on how BMI distributes  
[18] monies, based on its knowledge that DMX represented only 27  
[19] percent of all publisher line distributions and that if you did  
[20] that math, even assuming a hundred thousand DMX locations the  
[21] most that Universal would ever see, best case, is \$300,000,  
[22] that your representation to the board that it was likely that  
[23] Universal's guarantee would be recouped to the 75 to 100  
[24] percent range was fair and accurate, yes?  
[25] MR. FITZPATRICK: Object. That misstates his



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[1] testimony. Each of the premises that he just gave was not  
[2] consistent with the witness' testimony, your Honor.

[3] **THE COURT:** Was not?

[4] **MR. FITZPATRICK:** It was not. That was not the  
[5] witness' testimony, your Honor. All of the numbers that  
[6] Mr. Rich just gave were not -- the hypothetical is not  
[7] consistent with the witness' testimony.

[8] The witness' testimony was that they were not looking  
[9] at \$36.36 per location; and that's the premise of the question.

[10] **THE COURT:** Yes. The question asks you to accept the  
[11] premises not in your own view but in the view that he takes of  
[12] the matter.

[13] **THE WITNESS:** In the view that Mr. Rich lays out here  
[14] I don't know if I would say that it -- again, he doesn't have  
[15] any retroactive periods which this note has also in it. The  
[16] note to the board has that when all retroactive periods are  
[17] applied the recoupment would be in 75 to 100 percent range. I  
[18] don't see that in Mr. Rich's demonstrative so I don't think it  
[19] is comparing apples and apples.

[20] **BY MR. RICH:**

[21] **Q.** How would any retroactive year, pick any one you want, how  
[22] would the math come out dramatically different than what is on  
[23] the demonstrative?

[24] **A.** If you look at 6,000 the 27 percent from this analysis  
[25] would translate to Universal. And if you increased that by

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[1] three times, that's at least \$300,000 a year. There is two and  
[2] a half years open where DMX would pay a blanket rate under  
[3] their scenario from 2005 to the end of 2007 which would add to  
[4] your numbers, an additional three, six, almost \$850,000 on top  
[5] of that. So, that's why we would still have to get fees for  
[6] that period of time as we testified yesterday in the AFBL  
[7] quote. We suggested that they just take the \$36.36 rate for  
[8] those two and a half years.

[9] **Q.** You also testified that it is possible that you had gotten  
[10] \$49 or something like that, yes?

[11] **A.** I said it was something BMI was exploring and modeling  
[12] internally as a potential rate quote.

[13] **Q.** That was not communicated to the board, was it?

[14] **A.** No, it was not.

[15] **Q.** Now, BMI hadn't offered the composers whose BMI works are  
[16] represented by Universal, the same terms that were offered to  
[17] Universal, has it?

[18] **A.** No, we have not.

[19] **Q.** So that if the Universal advance were not to earn out the  
[20] effect would be, would it not, that per performance by DMX of  
[21] BMI works Universal would have received a greater sum than the  
[22] maximum 50 percent which BMI's operating rules call for,  
[23] correct?

[24] **A.** Under that scenario, yes, that would happen.

[25] **Q.** Was that discussed with the board?

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[1] **A.** No, it was not.

[2] **Q.** I take it that BMI has told Warner/Chappel that it stands  
[3] ready to consider a similar accommodation to that accorded to  
[4] Universal if and when requested by Warner/Chappel, is that  
[5] correct?

[6] **A.** That is incorrect.

[7] **Q.** We will discuss that with Ms. Smith who had something to  
[8] say on that subject.

[9] All of this activity, I take it, the payment of what  
[10] Mr. Arrow from Universal called an extraordinary guarantee at  
[11] his deposition in this case, all of this occurred, I take it,  
[12] on account of the direct line activities of a single BMI  
[13] licensee, DMX, that represents less than three tenths of one  
[14] percent of BMI's annual revenues, is that correct?

[15] **A.** DMX requested it from Universal. Universal contacted BMI  
[16] to see if we could match it and that's how it started. In  
[17] terms of DMX' overall fees compared to total revenues, I will  
[18] take your representation that it is about 3 percent, if that.

[19] **Q.** Notwithstanding their small scale, this was a very  
[20] important plugging of the dike, wasn't it, for BMI?

[21] **A.** I don't consider it a plugging of the dike, I consider it  
[22] responding to a publisher that has requested something from  
[23] BMI -- a major publisher and one of our biggest customers.

[24] **Q.** Pay an extraordinary guarantee, yes?

[25] **A.** Matching what they've been offered by an outside entity.

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[1] They say this is what they believe my catalog is worth, why  
[2] won't you --

[3] **Q.** Which two months earlier you declined to do as another  
[4] major, Sony?

[5] **A.** And I believe we declined Sony conveyed that \$2.71 million  
[6] guarantee or the \$1.3 million publisher was both -- I mean was  
[7] BMI only. We couldn't come close to that. We subsequently  
[8] found out that that was for BMI and ASCAP. I think if it was  
[9] BMI only we may have come close to it, Mr. Rich.

[10] **Q.** So, the fact as you write in the fourth paragraph of the  
[11] board memo that, quote: More and more publishers are being  
[12] asked by DMX to directly license. We have been notified that  
[13] at least one major publisher has entered into a direct license  
[14] with DMX and has accepted the guaranteed payment from DMX  
[15] wasn't what made the decision to extend this extraordinary  
[16] guarantee, right?

[17] **A.** It was the fact that we felt we could compete in this level  
[18] and get a return on the investment.

[19] **Q.** And so, as you further write, quote: Assuring that BMI  
[20] licenses in this market is important was not a factor or  
[21] significant factor in extending this extraordinary guarantee,  
[22] right?

[23] **A.** No. Again, I believe we should have a license in this  
[24] genre.

[25] **Q.** And having the ability to license Universal's music to help



[1] solidify BMI's position not only for this negotiation but for  
[2] the background music industry as a whole also wasn't a major  
[3] consideration, huh?  
[4] **A.** It was a consideration, yes.  
[5] **MR. RICH:** I have nothing else, your Honor. Thank you  
[6] very much.  
[7] **THE COURT:** Thank you, Mr. Rich.  
[8] **REDIRECT EXAMINATION**  
[9] **BY MR. FITZPATRICK:**  
[10] **Q.** Hello again, Mr. O'Neill.  
[11] **A.** Good afternoon.  
[12] **Q.** If we could start where we left off with the Sony and  
[13] Universal guarantees?  
[14] I just want to be clear. in both cases what BMI was  
[15] being asked was to match a proposal that DMX had made to those  
[16] two entities; correct?  
[17] **A.** That is correct.  
[18] **Q.** And during your cross-examination we looked at some of the  
[19] spreadsheets that you had put together, particularly in  
[20] connection with the Sony guarantee request, correct?  
[21] **A.** That is correct.  
[22] **Q.** Now, the proposals that you were being asked to match, were  
[23] those \$25 royalty pool proposals or were those proposals by DMX  
[24] to those publisher of guaranteed money?  
[25] **A.** They were guaranteed money.

[1] **Q.** And do you recall the amount of the guarantee? How was  
[2] that guarantee calculated by DMX?  
[3] **A.** I believe it was calculated at one and a half times what  
[4] BMI was paying the entity.  
[5] **Q.** So, when you were thinking about whether or not to match  
[6] those offers to Sony and -- to Sony and Universal that DMX had  
[7] made, were you thinking of those offers as \$25 royalty pool  
[8] offers? Or were you thinking of those offers as offers of 150  
[9] percent of what BMI had been paying in the past?  
[10] **MR. RICH:** Objection. Leading, your Honor.  
[11] **THE COURT:** Overruled.  
[12] **A.** I was initially thinking of what the actual number was, how  
[13] did they arrive at the number which was one and a half times.  
[14] I didn't even know the Sony license had a \$25 concept in it  
[15] until I got it about, very recently under the interim  
[16] agreement.  
[17] **Q.** Okay. Let's talk briefly. You were asked a few questions  
[18] on cross-examination about a TruSonic amendment. Do you recall  
[19] that?  
[20] **A.** Yes, I do.  
[21] **Q.** And you specifically discussed whether or not there have  
[22] been any incremental cost to BMI as a result of that amendment?  
[23] **A.** Yes.  
[24] **Q.** Now, has TruSonic actually sought to exclude any locations  
[25] under that agreement, to your knowledge?

[1] **A.** No, they haven't.  
[2] **Q.** And, has BMI done any monitoring in connection with that  
[3] amendment other than the usual monitoring that it does as part  
[4] of its business?  
[5] **A.** No, we haven't.  
[6] **Q.** So, have there been any incremental costs whatsoever to BMI  
[7] as a result of the TruSonic amendment?  
[8] **A.** No, there hasn't.  
[9] **Q.** You were asked a few questions about the 17 percent  
[10] domestic overhead rate. Do you recall that?  
[11] **A.** Yes, I do.  
[12] **Q.** And I just want to be clear, is the 17 percent overhead  
[13] rate applied to the entire commercial music service industry?  
[14] **A.** Yes, it is.  
[15] **Q.** And, in fact, with respect to every domestic dollar that  
[16] BMI receives, does it apply a 17 percent or higher overhead  
[17] rate to those dollars?  
[18] **A.** Yes, it does.  
[19] **Q.** If you could take a quick look at tab 8 which was the  
[20] demonstrative incremental costs.  
[21] **A.** Yes.  
[22] **Q.** And you were just asked a few questions about there being  
[23] multiple departments represented on here so I just want to be  
[24] clear about that. What are the two departments that are  
[25] represented on here?

[1] **A.** Licensing and performing rights.  
[2] **Q.** And the performing rights people, as Mr. Rich pointed out,  
[3] do not report to you, correct?  
[4] **A.** They do not.  
[5] **Q.** Who they report to?  
[6] **A.** Alison Smith.  
[7] **Q.** Do the licensing people report to you?  
[8] **A.** Yes, they do.  
[9] **Q.** And if we can be clear about the chart, the new hire on the  
[10] first row, will that be a licensing -- will that person report  
[11] to you?  
[12] **A.** Yes, they will.  
[13] **Q.** And in the second row, Kwasnik and Steinberg report to you,  
[14] correct?  
[15] **A.** Correct.  
[16] **Q.** And Tortora and Hunke report to Smith and the Smith is a  
[17] reference to Alison Smith?  
[18] **A.** That is correct.  
[19] **Q.** Under the next row, the per-program supervisor and new hire  
[20] and Steinberg are all licensing people?  
[21] **A.** They are.  
[22] **Q.** And then the Smith, Tortora and Hunke are performing rights  
[23] but are there any dollars claimed for those people?  
[24] **A.** No, there aren't.  
[25] **Q.** And then in the following row are all of the entrants other

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[1] than Smith, Tortora and Hunke, licensing people who would  
 [2] report to you?  
 [3] A. They are.  
 [4] Q. And, again, is any money requested for Smith, Tortora and  
 [5] Hunke?  
 [6] A. No, they're not.  
 [7] Q. And the same thing with the next row, Smith, Tortora and  
 [8] Hunke are performing rights people and, again, no money is  
 [9] requested, correct?  
 [10] A. That is correct.  
 [11] Q. I think in discussing this chart before you mentioned the  
 [12] per-program license. Does BMI have a per-program department?  
 [13] A. Yes, we do.  
 [14] Q. Who does that department report to?  
 [15] A. Michael Steinberg.  
 [16] Q. And who does Mr. Steinberg report to?  
 [17] A. Myself.  
 [18] Q. When was that department created?  
 [19] A. That was -- actually, when I joined BMI in December of '94  
 [20] we had a per-program department already up and running and that  
 [21] was for the interim local television per program.  
 [22] Q. And how many people are currently in that department?  
 [23] A. I believe there are five people in that department.  
 [24] Q. Has your experience with that department factored in, in  
 [25] any way, to the creation of the estimates on this chart?

[1] by more than 8 percent in each year of the correct, correct?  
 [2] A. That is correct.  
 [3] Q. In fact, if you take a look at tab 5 quickly, just to put a  
 [4] number on it, if you can look at the very last row on page 15,  
 [5] could you give the actual numerical growth that Play Network  
 [6] had over the term of the agreement?  
 [7] A. Yes. They started the agreement with 11,017 locations and  
 [8] they've ended the agreement with 32,595 locations.  
 [9] Q. And you have testified in fact that it was reasonable for  
 [10] Play Network to pay a fee that worked out to \$24.75 in the last  
 [11] year of the agreement, yes?  
 [12] A. Yes. In year five of the agreement that's what it called  
 [13] for.  
 [14] Q. Now, did DMX grow during the course of the 2004 to 2009  
 [15] time period?  
 [16] A. My understanding is they actually lost locations.  
 [17] Q. I think you also testified that it would be reasonable to  
 [18] give DMX a license on the same -- with the same economic  
 [19] parameters as the license given to Play Network, correct?  
 [20] A. That is correct.  
 [21] Q. And could you explain what you mean by that?  
 [22] A. Yes. I would offer him the same form agreement --  
 [23] Q. I'm sorry?  
 [24] A. -- as I offered to Play Network or Music Choice or  
 [25] TruSonic.

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[1] A. Yes, it has.  
 [2] Q. Could you explain that?  
 [3] A. I was there when in '94 I took over responsibility for the  
 [4] television per-program department right when we went to a new  
 [5] form of per program. We also went from three people to five  
 [6] people at that point in time to handle the workload involved.  
 [7] I just know from -- I think I may have said this  
 [8] yesterday -- in dealing with a license agreement while it might  
 [9] appear black and white in reality of administering that license.  
 [10] it is never as clear cut as it seems. There are disputes all  
 [11] the way through, especially with the new license. I will say  
 [12] that the man-hours spent on the early days of per program were  
 [13] tremendous. And today it is not nearly as intensive as when it  
 [14] first started but it is still requires five people to  
 [15] administer.  
 [16] Q. Okay, last topic.  
 [17] I think Mr. Rich spent some time with you establishing  
 [18] the fact that Play Network paid license fees in the final year  
 [19] of the contract that worked out to \$24.77 per location,  
 [20] correct?  
 [21] A. I think it was \$24.75.  
 [22]  
 [23] Q. \$24.75. If that's not what I said, I apologize.  
 [24] A. It is burned in there now.  
 [25] Q. As Mr. Rich established, that was because Play Network grew

[1] Q. And what would the result of that agreement have been for  
 [2] DMX?  
 [3] A. They effectively, using rough math, they would have been  
 [4] well north of the \$36.36.  
 [5] Q. And what is your actual offer to DMX in this proceeding?  
 [6] A. Just to cut it off at \$36.36.  
 [7] MR. FITZPATRICK: Thank you. I have no other  
 [8] questions.  
 [9] I did have one administrative matter, your Honor. On  
 [10] direct I was notified by the court reporter I identified an  
 [11] exhibit as tab 14. I failed to point out that it was  
 [12] Petitioner Exhibit 0126. It had been received but I didn't  
 [13] properly identify it.  
 [14] THE COURT: If a given location of one customer is  
 [15] fairly priced at \$25 a year, why isn't a given location of  
 [16] another customer also fairly priced at \$25 a year even though  
 [17] the other business arrangements, the history of how the \$25 was  
 [18] reached at is different between the two customers?  
 [19] THE WITNESS: I think this form agreement, you kind of  
 [20] have a bell curve, if you will. At the low end of the bell  
 [21] curve you have the \$24.75. At the high end I think Mr. Rich  
 [22] showed us some numbers around \$500 or \$600 per location. The  
 [23] average fee over that term ended about \$34.52. I think if --  
 [24] when we originally did this agreement we were going to have  
 [25] customers on all different ends of it being that the base was



[1] laid and we wouldn't ever receive less money that we've  
[2] negotiated in that first contract here. It was only what was  
[3] the value of that incremental dollars to that license.

[4] So, when I looked at it and when I reviewed this, your  
[5] Honor, I looked at it as a bell curve saying, yes, we have some  
[6] customers down here but we have some here, where is the  
[7] majority of them.

[8] **THE COURT:** Thank you.

[9] **MR. FITZPATRICK:** May Mr. O'Neill be excused, your  
[10] Honor?

[11] **MR. RICH:** I have no recross, your Honor.

[12] **THE COURT:** Thank you, Mr. O'Neill. You are excused.

[13] **THE WITNESS:** Thank you very much, your Honor.

[14] **MR. FITZPATRICK:** Should we move directly to our next  
[15] witness, your Honor, or would you like to take a break, first?

[16] **THE COURT:** I take it that the short summary of that  
[17] answer, Mr. O'Neill, is that the fact that one given location  
[18] might be priced at \$25 does not mean that all locations should  
[19] be priced at \$25.

[20] **THE WITNESS:** That is correct.

[21] **THE COURT:** Because of the other provisions of release  
[22] that result in quite different prices under other circumstances  
[23] covered by the lease?

[24] **THE WITNESS:** That is absolutely correct.

[25] **THE COURT:** Thank you.

[1] **THE WITNESS:** Thank you, your Honor.

[2] **THE COURT:** Were you suggesting, do you want a recess  
[3] now?

[4] **MR. FITZPATRICK:** I could call the next witness or if  
[5] we are going to take a short break we can take it right now.  
[6] Whatever is convenient.

[7] **THE COURT:** Normally I take it about half an hour  
[8] later are but if for some reason you want to do it now, you  
[9] can.

[10] **MR. FITZPATRICK:** No, we can get started now.

[11] **THE COURT:** Okay.  
[12] (Continued on next page)  
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[23]  
[24]  
[25]

[1] **MR. FITZPATRICK:** Your Honor, for our next witness BMI  
[2] calls Mr. Thomas Annastas.

[3] **THOMAS ANNASTAS,**  
[4] called as a witness by the Plaintiff,  
[5] having been duly sworn, testified as follows:

[6] **THE DEPUTY CLERK:** Please state your name and spell  
[7] your last name slowly for the record.

[8] **THE WITNESS:** My name is Thomas Annastas,  
[9] A-n-n-a-s-t-a-s.

[10] **MR. FITZPATRICK:** Your Honor, may I approach with a  
[11] binder of exhibits?

[12] **THE COURT:** Sure.

[13] **DIRECT EXAMINATION**  
[14] **BY MR. FITZPATRICK:**

[15] **Q.** Good afternoon, Mr. Annastas.

[16] **A.** Good afternoon.

[17] **Q.** Are you currently employed by BMI?

[18] **A.** Yes.

[19] **Q.** Where are you located at BMI?

[20] **A.** In Nashville, Tennessee.

[21] **Q.** How long have you been with BMI?

[22] **A.** 37 years.

[23] **Q.** And currently, what's your position at BMI?

[24] **A.** Vice president of licensing.

[25] **Q.** What do you do as vice president of licensing?

[1] **A.** I oversee the sales and marketing area for licensing in  
[2] both the media and the general licensing areas.

[3] **Q.** And what is the general licensing area at BMI?

[4] **A.** General licensing area handles approximately 30 industries.  
[5] It's everything from hotels, symphonies, colleges, restaurants,  
[6] bars, nightclubs, retail I could go on from there.

[7] **Q.** Could you give a rough estimate of how many general  
[8] licensees BMI has?

[9] **A.** Approximately 70,000 licensees, which actually includes  
[10] about 100,000 locations.

[11] **Q.** And what's BMI's approximate annual revenue in total from  
[12] these general licensees?

[13] **A.** About \$104 million.

[14] **Q.** Does BMI offer general kinds of -- is there just one kind  
[15] of general license or does BMI offer different kinds of general  
[16] license?

[17] **A.** There's basically a form license agreement for each  
[18] industry. There's one for hotels, there's one for restaurants,  
[19] bars and nightclubs, retail and so forth.

[20] **Q.** If you could take the binder that I've given you and turn  
[21] to tab 1, please. And there is a document at tab 1 which is  
[22] Joint Exhibit 0780. If you could take a look at that and  
[23] identify it, please?

[24] **A.** It's the license agreement that we negotiated with the  
[25] American Hotel Association that we offer to hotels and motels.

[1] Q. And what is the American Hotel Association?  
[2] A. The American Hotel & Lodging Association represents most of  
[3] the hotels in the country, and they, as representation they  
[4] negotiate this license and other things for their members.  
[5] Q. Now, what types of music use does this license at tab 1  
[6] cover?  
[7] A. It covers live and recorded music.  
[8] Q. And how many, about how many hotels have signed this  
[9] license?  
[10] A. About 4500 hotels.  
[11] Q. Now, you mentioned that this was negotiated with the AHLA.  
[12] Who negotiated it on BMI's behalf?  
[13] A. On BMI's behalf it was Mike Steinberg and myself.  
[14] Q. And when did those negotiations occur?  
[15] A. This last agreement was 1999 and it self renews every year.  
[16] Q. Could you just generally describe those negotiations? What  
[17] were they like?  
[18] A. The Hotel Association had a negotiating committee, and they  
[19] had representations from everything from the casinos all the  
[20] way down to the smaller hotels, and they probably lasted  
[21] approximately two and a half to three years.  
[22] Q. Was the fee one of the terms that was negotiated?  
[23] A. Absolutely. The fee was probably the biggest part of the  
[24] negotiation at the time that we started negotiations. At the  
[25] time we started negotiations we wound up being paid less than

[1] Q. And if you could just using those schedules briefly  
[2] describe for his Honor how the fee would be calculated under  
[3] this license for a hotel.  
[4] A. Schedule A basically deals with the live music and  
[5] entertainment of the hotel. So if a hotel had live music for  
[6] the year 2009, they would tell us how much entertainment cost  
[7] they had spent, and, for example, if it was \$100,000, you'd go  
[8] down the bracket of annual live music and entertainment cost,  
[9] you see it says 100,000 to 119,999.99, and their annual fee for  
[10] music alone would be \$3,582.  
[11] Q. How about an example where a hotel had no live music at all  
[12] but just played let's say recorded music in the lobby, for  
[13] example? How would their fee be calculated?  
[14] A. Their fee would be calculated on Schedule B. It says  
[15] recorded music only fee, no live music performed. So, for  
[16] example if the hotel had 115 rooms, it's based on the number of  
[17] rooms. You would go and the second bracket is 101 to 300  
[18] rooms, and you'd go across, it says 2009 without AV and their  
[19] fee would be \$401.  
[20] Q. What's the without AV refer to?  
[21] A. Audio visual, if they didn't have TV's in their lobby or  
[22] whatever.  
[23] Q. Now, just to be clear, if a hotel gets the only music that  
[24] it uses from a commercial music service like DMX, do they need  
[25] this license?

[1] ASCAP and our commitment to them was to get parity with ASCAP.  
[2] Q. Are there other situations where BMI negotiates direct  
[3] licenses with industry associations analogous to the AHLA?  
[4] A. Yes.  
[5] Q. Could you give some examples of those?  
[6] A. The symphony area. The American Symphony Orchestra League  
[7] negotiated a license with us. Colleges represented by NACUBO  
[8] and ACE, that's a negotiated licensing. The Bowling  
[9] Proprietors Association, North American Concert Promoters  
[10] Association, and there's probably at least a dozen more.  
[11] Q. Does BMI have a preference between negotiating with a  
[12] industry-wide group like that versus developing a license on  
[13] its own without negotiation?  
[14] A. We reach out to every association that we possibly can and  
[15] when we reach out to them, the first thing we ask for them is  
[16] to negotiate a license, and we've been doing that for quite a  
[17] few years.  
[18] Q. Why does BMI do that?  
[19] A. It's more favorable for both sides that if we have a  
[20] negotiated rate all of their members would understand the  
[21] agreement, they'd help us educate and it's a win-win for both  
[22] sides.  
[23] Q. If you could turn to page 3 of tab 1, and you see there's a  
[24] Schedule A, a Schedule B and Schedule C there.  
[25] A. Okay. Yes.

[1] A. No.  
[2] Q. How is the hotel licensed if they get their music solely  
[3] through a commercial music service?  
[4] A. If it was DMX, DMX would not only supply the music, but  
[5] they would supply the coverage of the license agreement with  
[6] BMI and they would pay us, the average would be \$36.36.  
[7] Q. Not for DMX currently, but under the final commercial music  
[8] services agreement?  
[9] A. Yes.  
[10] Q. If you could take a look at tab 2 of the binder, please.  
[11] And this is Joint Exhibit 0781. If you can take a look at that  
[12] and identify it, please?  
[13] A. It's a license agreement for the restaurant, nightclubs and  
[14] bars. It's called the music license for eating and drinking  
[15] establishments.  
[16] Q. And about; how many restaurants, nightclubs and bars have  
[17] signed this license with BMI?  
[18] A. Since its interception probably well over 70,000.  
[19] Q. And again, what types of music use that restaurants  
[20] nightclubs and bars might make does this license agreement  
[21] cover?  
[22] A. Both live and recorded.  
[23] Q. Do different types of music use get different rates under  
[24] this agreement?  
[25] A. Yes. If you look at the calculation page on page 3, it



[1] starts off just like the other one with live music only, and  
[2] it's based on the frequency of music per week, frequency of  
[3] live music per week, and it's also based on rate per year per  
[4] occupant. So if the restaurant has a band playing three nights  
[5] a week, you basically go down to that first schedule and the  
[6] rate would be \$4.35 and if they --  
[7] **Q.** Can I just ask you, I just want to make sure we're  
[8] following. You're in the live music box?  
[9] **A.** Yes, first category.  
[10] **Q.** Multiple singers, instrumentalists?  
[11] **A.** Yes, I am.  
[12] **Q.** I'm sorry, go ahead. I just wanted to make sure where you  
[13] were.  
[14] **A.** You're in the multiple singer instrumentalists because  
[15] you're a band, four or five members. Because it's three  
[16] nights, it would go to the category of two to four nights and  
[17] the rate there is \$4.35. If they had a hundred occupants in  
[18] their restaurant as an established fire occupancy code you  
[19] would multiply the hundred times \$4.35 and they pay us \$435 a  
[20] year if they had no other music used.  
[21] **Q.** Now, the hotel agreement didn't use a per occupant rate,  
[22] correct?  
[23] **A.** No, it was based on entertainment cost.  
[24] **Q.** And what's the metric for the hotel agreement for recorded  
[25] music only?

[1] **A.** Recorded music, it's the number of rooms.  
[2] **Q.** So why the difference? Why use occupants for a restaurant  
[3] and rooms for a hotel?  
[4] **A.** I think part of what a restaurant has is a fire occupancy,  
[5] so based on the fire occupancy that they have, it's an  
[6] established code that we know exactly how many the restaurant  
[7] can have within their restaurant, and when we talk to the  
[8] industry, they thought it was a good indication of how many  
[9] people would be in and out of the place.  
[10] **Q.** If you could, again, back on page 3 of the restaurant  
[11] agreement at tab 2, I think you took us through a live  
[12] entertainment example, but could you do an example for a  
[13] restaurant, that the only music it uses is recorded music?  
[14] **A.** If you go to number 2, the second box, it says recorded  
[15] music, and recorded music here is tapes, records, free play  
[16] jukebox, DJ's, VJ's, CD's, or other digital music like iPods.  
[17] And the rate there is \$2.55 per occupant. If they have a  
[18] hundred occupants, you'd multiply that out and it would be  
[19] \$2.55 times 100, which is \$255. But if that's the only music  
[20] used, the minimum fee on this license is \$320.  
[21] **Q.** And is there a reference to that minimum fee on this page?  
[22] **A.** Yes. If you go down to right under category six or number  
[23] six, it says annual minimum fee if over \$320. Enter annual fee  
[24] here. If less, 320 or less, enter annual minimum fee of \$320.  
[25] **Q.** And again, if the restaurant, if the only music that a

[1] restaurant used was recorded music and it got all of that music  
[2] from a commercial music service like DMX, would the restaurant  
[3] need the license we've been looking at?  
[4] **A.** No, they wouldn't.  
[5] **Q.** Now, was this license agreement, the restaurant agreement,  
[6] negotiated?  
[7] **A.** No, it wasn't.  
[8] **Q.** Why not?  
[9] **A.** We had reached out to the National Restaurant Association  
[10] and they weren't interested, but what we did was develop a rate  
[11] structure and contact all of the state restaurant associations  
[12] and we had a focus group that came in and took a look at the  
[13] agreement, rate structure and had some input as to how they  
[14] thought it would work better and helped us with some of the  
[15] definitions for the members.  
[16] **Q.** Did you incorporate any of their input?  
[17] **A.** Yes, we did.  
[18] **Q.** Does BMI currently have any arrangements with any of the  
[19] state or national restaurant associations?  
[20] **A.** We've currently got about 60 or 62 state association  
[21] programs with them and we offer the state associations a  
[22] discount for their members in exchange for them marketing and  
[23] educating their members about BMI and the license agreement.  
[24] **Q.** Are there any other industries where there's been an  
[25] analogous situation that is not a negotiated license but focus

[1] groups have come in?  
[2] **A.** Yes. We've got the fitness industry. We've worked with  
[3] them, one of the associations, is IRSHA, which is the  
[4] International Racquet Sports and Health Association, and it's  
[5] where all fitness center members took a look at this along with  
[6] the executive director of the association.  
[7] **Q.** Do the industry groups that we've been talking about  
[8] provide any education functions on BMI's behalf?  
[9] **A.** Yes, they do.  
[10] **Q.** Could you explain that?  
[11] **A.** Again, going back to these discount programs that we've  
[12] developed with them, everything from their website has material  
[13] on their website about BMI and that they can link directly to  
[14] us so they know exactly how to explain BMI to their members.  
[15] We've also developed Q and A's, FAQ sheets they can distribute  
[16] directly to their members. We've done press, we've been  
[17] invited to some of their board meetings and we've made  
[18] presentations at the conventions whereby we can educate their  
[19] members, but the bulk of the education comes from the  
[20] association itself.  
[21] **Q.** Why is that important to BMI, why is that education  
[22] function?  
[23] **A.** Again, copyright is a tough thing to understand as it is,  
[24] and when you get down to these industries, whether it's a hotel  
[25] or a restaurant or a fitness center, they really don't



[1] understand copyright and understand performing rights either.  
 [2] So it's much better to educate them through the association,  
 [3] because it's a party that they believe in, they understand and  
 [4] it's in forms of education that they help present to their  
 [5] members.  
 [6] **Q.** If you could turn to tab 3, please, in your binder. And  
 [7] this is Joint Exhibit 0782. If you could take a look at that  
 [8] and identify it, please?  
 [9] **A.** This is the license agreement that was developed for the  
 [10] retail establishments.  
 [11] **Q.** And what kinds of establishments does BMI include within  
 [12] retail establishments?  
 [13] **A.** It ranges from department stores like Nordstrom's to  
 [14] Limited to beauty salons, any type of service situation.  
 [15] **Q.** What kind of music use by retail establishments does this  
 [16] license cover?  
 [17] **A.** It covers both live and recorded.  
 [18] **Q.** Can you estimate about how many retail establishments have  
 [19] signed this particular license?  
 [20] **A.** Probably around 6,000.  
 [21] **Q.** Now, was this license negotiated?  
 [22] **A.** No.  
 [23] **Q.** Why not?  
 [24] **A.** We reached out to the retail, National Retail Federation  
 [25] and the NFIB, which is the National Federation of Independent

[1] **Q.** And how much would the commercial music service pay for  
 [2] that location if it had the last final agreement with the  
 [3] users?  
 [4] **A.** 36.36.  
 [5] **Q.** Why the disparity in rates from your perspective,  
 [6] Mr. Annastas?  
 [7] **A.** I think over the years the background music service has  
 [8] given us volumes of locations, and we gave them a volume  
 [9] discount.  
 [10] **Q.** And what's your view of that discount today, Mr. Annastas?  
 [11] **A.** I think over the years, things have changed, especially in  
 [12] the last decade with technology and how we do business at BMI,  
 [13] and all performing rights organizations, where I think  
 [14] technology has made it more readily available for us to get to  
 [15] these individual locations. So I think the difference in what  
 [16] we get directly is, it's ten times more in most instances, and  
 [17] I think that's more of a disparity than it should be.  
 [18] **Q.** If I could ask you to turn to tab 4 of the binder.  
 [19] **A.** Okay.  
 [20] **Q.** And we have there Joint Exhibit JX 0132. The Court has  
 [21] seen it before. If you could just identify that document,  
 [22] please?  
 [23] **A.** It's the license agreement with Muzak LLC.  
 [24] **Q.** Were you involved with the negotiation of this agreement?  
 [25] **A.** Yes.

[1] Businesses, and they really had no issue that their members  
 [2] felt performing rights were important to them, so they had no  
 [3] interest in negotiating.  
 [4] **Q.** Can you turn to page 3 of the agreement?  
 [5] **A.** Okay.  
 [6] **Q.** And again, we have a license fee schedule. Maybe if you  
 [7] could just take the recorded music only example and explain to  
 [8] the Court how the fee would be calculated under this agreement.  
 [9] **A.** If we go to Schedule 1A and it says recorded music, one to  
 [10] nine locations, one to nine licensed retail premises, minimum  
 [11] fee of not less than the lowest class fee applies to each  
 [12] licensed retail premise. That means the smallest fee would be  
 [13] \$207.24, if you go into the categories, but it's broken down  
 [14] into class and it's class 1 through 9.  
 [15] The second category is total square footage of each  
 [16] licensed retail premise.  
 [17] Third category is the annual license fee for audio  
 [18] only performances and then fourth category is annual license  
 [19] fee for audio visual performances. If you had a square footage  
 [20] of your store retail establishment about 4,000, you'd go to  
 [21] class 3 and it's 2501 to 5000 square feet. If you had audio  
 [22] only it would be \$402.27.  
 [23] **Q.** And again, if the retail establishment got all its music  
 [24] from a commercial music service would it need this license?  
 [25] **A.** No.

[1] **Q.** Who else was involved on both sides of the negotiation?  
 [2] **A.** From BMI it was Marvin Berenson, John Shaker and myself,  
 [3] and from Muzak it was Mike Zendan and Rod McCinnis of Abry.  
 [4] **Q.** How long did those negotiations last?  
 [5] **A.** From the first negotiation started in 1994 when the old  
 [6] agreement expired, and then we had the rate court action, so in  
 [7] reality, that itself, that period was about eight years, and  
 [8] then the last negotiation that brought this agreement to  
 [9] fruition was started in early 2002 after the rate court hearing  
 [10] ended.  
 [11] **Q.** And when did the negotiations culminate in an agreement?  
 [12] **A.** 2004.  
 [13] **Q.** What was BMI's goal in these negotiations with Muzak?  
 [14] **A.** I think that the key we were trying to get to was as close  
 [15] to parity with ASCAP.  
 [16] **Q.** What was the basis for that goal?  
 [17] **A.** ASCAP had paid 49.50 per location, and as Mike had  
 [18] testified before, we were getting anywhere between 10 and \$12  
 [19] per location. We also had a per location rate on the  
 [20] off-premise, on the on-premise in the old agreement that was  
 [21] \$20.50. So we actually thought that if we could increase the  
 [22] market share from the previous agreement, we should get closer  
 [23] parity with ASCAP.  
 [24] **Q.** When you say market share, what are you referring to?  
 [25] **A.** The amount of BMI music that was being played on commercial